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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 360

BALLESTER HERMANOS, PETITIONER

v.

RAFAEL BUSCAGLIA, TREASURER OF PUERTO RICO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of Puerto Rico (R. 5–16) and the opinion of the Supreme Court of Puerto Rico (R. 17–43) are contained in the record in English translation. The opinion of the insular Tax Court is not yet reported; the opinion of the insular Supreme Court is reported in 66 P. R. R. 560 (Spanish edition). The opinion of the Circuit Court of Appeals (R. 50–55) is reported in 162 F. 2d 805.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 17, 1947. (R. 55.) The

petition for a writ of certiorari was filed on September 22, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does Puerto Rico have the power to impose a property tax on imported merchandise which on the assessment date was on a foreign ship in San Juan harbor and had not yet been released to the importer by the customs authorities?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved are set forth in the Appendix, *infra*, pp. 13–17.

STATEMENT

Taxpayer, Ballester Hermanos, is an entity domestic to Puerto Rico, being a *sociedad mercantil* organized under the laws of Puerto Rico (R. 19) with its main office at San Juan. Taxpayer imported into Puerto Rico from Argentina merchandise valued at $118,250, which arrrived in the port of San Juan on January 13, 1943, in an Argentine ship. The Treasurer of Puerto Rico demanded payment of the general *ad valorem* property tax in the amount of $3,382.12, for the fiscal year 1943–1944 on this merchandise, assessed on January 15, 1943. Taxpayer contested this claim in the Tax Court of

Puerto Rico, where the parties stipulated that taxpayer "had guaranteed payment for the merchandise" and "had accepted drafts in payment for part of the merchandise prior to January 15 * * * but that it could not be unloaded due to customs proceedings until * * * the customs authorities gave the release pursuant to Federal laws * * * on January 18 or 20, 1943." (R. 17.)

There is no dispute that taxpayer owned the merchandise (R. 50) or that it was destined to become, as in fact it later became, a part of the permanent mass of property in the island (R. 51).

The Tax Court sustained the assessment (R. 5–16); the tax was paid under protest (R. 3) and the case was brought to the insular Supreme Court on certiorari to review the decision of the Tax Court in favor of the Treasurer (R. 1–5, 17). The insular Supreme Court reversed the order of the insular Tax Court for reasons set forth in its opinion (R. 17–43) and remanded the case with instructions to enter an order in favor of taxpayer (R. 43–44). Upon the Treasurer's appeal, however, the court below reversed the insular Supreme Court on the ground that Congress in the exercise of its plenary power in the premises had by statute authorized the insular legislature to impose the tax. (R. 50–55.)

ARGUMENT

1. No question of local law is involved. Taxpayer's contention in its petition (pp. 5, 6–9) and its brief (pp. 22–24), that there is here presented a question as to whether or not the insular taxing statute meant to authorize the tax imposed, has no basis in the record. Neither the insular Tax Court nor Supreme Court doubted that the local statute imposed the tax; they differed only on the issue of whether or not, construing a federal statute (Organic Act, Section 3, Appendix, *infra*, pp. 13–14), Congress meant to confer upon the insular legislature the power to impose it. (R. 12–15, 31–36.)

The tax, which Puerto Rico here asserts, is the conventional *ad valorem* general property tax, involving valuation or assessment of both real and personal property as of a definite tax date annually (here January 15th) and the application of a uniform rate. This tax has been levied by the insular government substantially during the entire period of American sovereignty; statutory authorization for it is contained in the Political Code of Puerto Rico (March 1, 1902, Title IX, c. 1, Sections 285 to 352).[1] The particular language here governing provides (Section 297):

> That all personal property within or without Puerto Rico shall be assessed to the

[1] Pertinent provisions are included in the Appendix, *infra*, pp. 15–17.

> owner thereof * * * on the fifteenth day of January, * * *

The tax is imposed for a fiscal year, beginning the following July 1st, and is payable semi-annually in advance on the first days of July and January. It is settled that merchandise located in San Juan harbor is "within" Puerto Rico. *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362.

While taxpayer argues that this statute was not intended to apply instantly, it concedes that the insular Supreme Court "did not expressly base its judgment on this point, and did not discuss or mention it." (Pet. 8.) Moreover, it is plain from its opinion that the insular court affirmatively held that the local statute imposed the tax. The question of "power" of the insular legislature is the one to which the insular court in its opinion explicitly directed itself. (R. 17.) Surely, had it not construed the local statute to include the disputed tax, under well settled principles, the question of power would never have arisen. Indeed, repeatedly its opinion evidences its holding that the local statute imposed the tax. (R. 19–20, 23, 24, 32, 37.)

Concededly the disputed tax "is literally authorized by the broad terms of Sections 285 and 297 of the insular Political Code." (Br. 22.) Hence, on well settled principles, assuming that Congress first conferred the power to impose the tax, under the instant circumstances, upon the

insular legislature in 1927 by the Butler Act, Act of March 4, 1927, c. 503, 44 Stat. 1418, Section 1, amending Section 3 of the Organic Act (Appendix, *infra,* pp. 13–14), there is no *a priori* reason to suppose that the legislature did not intend it to apply here. Taxpayer concedes the case is within the language of the statute; therefore, it is within its operation, since it cannot validly be claimed that if the particular case had been called to the insular legislature's attention, it would have varied the statute. *Puerto Rico* v. *The Shell Co.,* 302 U. S. 253, 257; *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 644; *Rivera* v. *Buscaglia,* 146 F. 2d 461, 463 (C. C. A. 1st).

Nor is it significant, despite taxpayer's argument to the contrary (Br. 32) that subsequent to the passage of the Butler Act, the insular legislature amended existing excise tax laws by expressly extending them to apply on introduction of articles into Puerto Rico and that no corresponding change has been made with respect to the property tax here involved, since obviously, no additional insular legislation was requisite, after the Butler Act, to apply the property tax to goods in customs custody. The provisions of the existing statute (Political Code, Section 297, Appendix, *infra,* pp. 16–17) already sufficed to include all personal property "within or without Puerto Rico," to which the power to tax of the insular legislature extended. On the other hand, in the case of excises, it was requisite expressly to ex-

tend the imposition of the tax to the *introduction* of the articles into Puerto Rico, for that was made the taxing point or act.

In any event, clearly the only question involved in the case, and the only one upon which the court below ruled, is the construction of the meaning of Congress in the Organic Act, as originally passed and as amended by the Butler Act; clearly no question of local law is involved. The error claimed in the judgment of the insular court, which we contend the court below properly corrected, was founded solely on construction by the local court of federal legislation and of the intent of Congress.

2. The court below was clearly correct in holding that Section 3 of the Organic Act as amended by the Act of March 4, 1927 (Butler Act), authorized the insular legislature to levy the instant tax as an "internal revenue" tax upon an article as soon as brought into the island.[2] (R. 53–55.) The holding of the insular Supreme Court on the other hand was that a property tax, such as that

[2] The Butler Act (Act of March 4, 1927), to the extent here pertinent, amended Section 3 of the Organic Act so that, as amended, it read as follows (Appendix, *infra*, pp. 13–14):

> SEC. 3 [as amended by Act of March 4, 1927, c. 503, 44 Stat. 1418, Sec. 1]. That no export duties shall be levied or collected on exports from Puerto Rico, but taxes and assessments on property, income taxes, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may

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instantly involved, does not fall within the classification of "internal revenue" taxes within the meaning of the Butler Act or the Organic Act. (R. 35–36.) This, it seems clear, the insular court regarded as decisive; if it had understood the Butler Act to include property taxes within the meaning of "internal revenue" taxes, the tax must have been sustained.[3] (R. 31–36.)

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be provided and defined by the Legislature of Puerto Rico; * * *.

And it is further provided, That the internal-revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island: *Provided*, That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Puerto Rican government in the collection of these taxes. (48 U. S. C. 1940 ed., Secs. 741 and 741 (a).)

The Butler Act added the entire second paragraph, quoted above, and the words "income taxes" to the first paragraph.

[3] Moreover the insular court recognized that an unfortunate consequence of its construction of the Butler Act was the possibility of tax discrimination against merchandise brought into the island from the United States in favor of merchandise imported from foreign countries. (R. 34.) Thus, if the decision of the insular court had been sustained, merchandise brought into Puerto Rican ports from the United States and not yet unloaded from the incoming vessel on the assessment date would have been subject to the instant property tax, which, on the other hand could not have been

Since the statute under consideration is in the nature of a Constitution for the territory, the court below correctly afforded it a broad and not a narrow construction. *Puerto Rico* v. *Shell Co.*, *supra*. Certainly Congress meant, when it wrote "internal revenue" into this fundamental statute, all the "revenue" which the background and legislative history of both nation and possession had classified as "internal," and this clearly comprehended property taxes.

"Internal revenue" is a term characteristic of the legislation and fiscal administration of the United States and although apparently not explicitly defined by statute, it maybe traced back to an early period in our national history. *"The Federalist"* discusses internal taxes and in particular Nos. 30 and 36, attributed to Hamilton, explicitly include among internal taxes, direct property taxes. In

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levied on merchandise similarly situated, imported from a foreign country, as was the merchandise here. (R. 34, fn. 20a; R. 43–44, fn. 25.) This would follow from the fact that the customs authorities obtain no jurisdiction over American goods. Clearly it is more consonant with the purpose of the statute, its language, and its legislative history to hold that Congress intended to cover the subject completely and in particular did not mean to legislate and discriminate against American goods. This is the express proviso of the statute. See also the Senate Committee Report which recommended the amendment (S. Rep. No. 1011, 69th Cong., 1st Sess., p. 2). In *West India Oil Co.* v. *Domenech*, 311 U. S. 20, 27, rehearing denied, 311 U. S. 729, this Court clearly indicated its understanding that the Butler Act, so far as concerns local taxation, intended American and foreign goods to be treated alike, not that foreign goods be preferred.

the first decade of government under the Constitution, property taxes actually were imposed by Congress under the head of internal revenue taxes and directed to be collected by "collectors of the internal revenues of the United States." Act of July 14, 1798, c. 75, 1 Stat. 597, 598, Section 2. Similarly the direct property taxes imposed during the War of 1812 and the War between the States were in both instances regarded and administered as internal revenue. Act of July 22, 1813, c. 16, 3 Stat. 22, 25, Sections 1 and 2. Act of July 1, 1862, c. 119, 12 Stat. 432, 446, Sections 1 and 38.

From the beginning the insular Political Code had provided that the instant property tax be assessed and collected by "internal revenue agents" (Sections 288 and 289).

"License fees" and "royalties for franchises, privileges and concessions" surely are included within the meaning of the term "internal revenue". Hence, properly construed, the several types of taxes mentioned in Section 3 of the Organic Act, contrary to the assumption of the insular Supreme Court (R. 35–36) and taxpayer (Br. 25), are not necessarily to be regarded as mutually exclusive. Congress desired to confer upon the insular legislature the broadest taxing powers and some of the classes of taxes named obviously overlap. Similarly, the Constitution in authorizing Congress "To lay and collect Taxes, Duties, Imposts

and Excises" (Article I, Section 8); in prohibiting "tax or Duty" on exports (Article I, Section 9); and by the Import Clause, denying to the states the authority to "lay any imposts or Duties on Imports or Exports" (Article I, Section 10, Appendix, *infra*, p. 13), employed broad and overlapping terms for several types of taxes, which are not mutually exclusive.

Moreover although a sales tax was directly involved in *West India Oil Co.* v. *Domenech,* 311 U. S. 20, rehearing denied, 311 U. S. 729, this Court there held the plain purport of the Butler amendment to be that *any tax* authorized by the Organic Act may be levied with respect to articles as soon as brought into the island. Had this Court in the cited case construed the Butler amendment to refer to a limited type of tax only, namely internal excise taxes, surely the broad language of the opinion (pp. 27–28) would not have been employed. The court below correctly applied the cited case here.

3. The question here involved is not important and its settlement is not requisite in the public interest. The tax is assessed on only one day in a year; the instant facts are not likely, except by rare coincidence, to be presented to the courts in another case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1947

APPENDIX

Constitution of the United States of America:

ARTICLE I.

* * * * *

SECTION 10. * * *

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

* * * * *

ARTICLE IV.

* * * * *

SECTION 3. * * *

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *

Organic Act of Puerto Rico (Act of March 2, 1917), c. 145, 39 Stat. 951, as amended by the Act of May 17, 1932, c. 190, 47 Stat. 158:

* * * * *

(48 U. S. C. 1940 ed., Sec. 737.)

SEC. 3 [as amended by Acts of March 4, 1927, c. 503, 44 Stat. 1418, Sec. 1]. That

no export duties shall be levied or collected on exports from Puerto Rico, but taxes and assessments on property, income taxes, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Puerto Rico; * * *.

And it is further provided, That the internal-revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island: *Provided,* That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Puerto Rican government in the collection of these taxes. (48 U. S. C. 1940 ed., Secs. 741 and 741a.)

SEC. 37. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities so far as may be necessary, and to provide and repeal laws and ordinances therefor; also the power to alter, amend, modify, or repeal any or all laws and ordinances of every character now in force in Puerto Rico or municipality or district thereof in

so far as such alteration, amendment, modification, or repeal may be consistent with the provisions of this Act.

* * * * *

Political Code of Puerto Rico (March 1, 1902):

SEC. 285. (Repealed by implication by the following section of an Act approved March 12, 1908, p. 187).

SECTION 1. That for and during the fiscal year beginning the first day of July, nineteen hundred and eight, and ending the thirtieth day of June, nineteen hundred and nine, and in every succeeding fiscal year, unless otherwise provided by the Legislative Assembly of Puerto Rico, there shall be levied and collected, for the purpose of providing Insular and municipal revenue, by the Insular Government, a tax of ten one-hundredths of one per cent and by the municipalities a tax of not exceeding ninety one-hundredths of one per cent upon the value of all real and personal property in Puerto Rico, and of all personal property of persons residing in Puerto Rico, to be ascertained as hereinafter provided, not hereinafter exempted from taxation. * * *

SEC. 290. (As amended by Act of March 10, 1904, p. 169.) That all property not expressly exempted from taxation shall be assessed and taxed. For the purposes of the assessment and collection of taxes, real property shall be deemed to be synonymous with immovables as defined in sections 333, 334 and 335 of the Civil Code: *Provided, however,* That machinery, vessels, instruments or implements not fixed to the building or soil shall not be deemed to be real property. Personal property shall include

such machinery, vessels, instruments or implements not fixed to the building or soil, livestock, money, whether in the possession of the owner thereof or held by or on deposit with some other person or institution, bonds, stocks, certificates in unincorporated syndicates or partnerships, patent-rights, trade-marks, franchises, concessions and all other matters and things capable of private ownership and not included within the meaning of the term "Real property," but shall not include book-credits, promissory notes nor other personal credits.

SEC. 293. Commission merchants and all persons dealing and trading on commission, assignees authorized to sell, and persons having in their possession property belonging to another, subject to taxation in the assessment district where said property is found, shall, for purposes of taxation be deemed the owners of the property in their possession.

SEC. 297. (As amended by Act of September 3, 1910, p. 37.) That all personal property within or without Puerto Rico shall be assessed to the owner thereof in the municipality in which he resides on the fifteenth day of January, except that such personal property as goods, wares, merchandise, and other stock-in-trade; machinery employed in any branch of manufacturing or business, including machines leased or operated under a stipulation providing for the payment of a royalty; horses and other livestock, and all other personal property having a permanent location within a municipality shall be assessed to the owner in the municipality in which it is thus situated; and that shares of banks doing business in Puerto Rico

shall be assessed to their owners in the municipality where the banks are situated, as hereinafter provided.

SEC. 330. (As amended by Act No. 148 approved May 14, 1943.) The taxes imposed on real and personal property shall be payable semiannually in advance on the first day of July and January of each year. Such taxes shall become delinquent if not paid within sixty days after the date on which the same become due, * * *.

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